No. 2825

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL SURETY COMPANY,
Plaintiff in Error,

vs.

COUNTY OF LINCOLN,
Defendant in Error.

REPLY BRIEF.

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I.

It is argued for the County that as the surety company became surety for a consideration, the principles of law controlling the liability of sureties without compensation do not apply. This argument is fully answered by the statute law of Montana authorizing foreign surety companies to do business in that state. Section I of the Act of March 10, 1909 (Session Laws of 1909, p. 209), provides that such companies may be accepted as surety upon a bond of any person or corporation required by the laws of the state to execute a bond;

> " * * it being the intention of this chapter to enable corporations created for that purpose to become the surety on bonds required by law, *subject to all the rights and liabilities of private persons.*"

Section III of the same Act provides that:

> "Such company may be released from its liability on a bond on the same terms and conditions as are by law prescribed for the release of individual sureties."

The provisions of the statute of Montana relating to the exoneration of sureties are as follows:

Section 5686 of the Revised Codes of Montana provides:

> "A surety is exonerated:
>
> 1. In like manner with a guarantor.
>
> 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
>
> 3. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety, which it is his duty to do."

Section 5673 provides:

> "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal *is altered in any respect,* or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired or suspended."

In the case of Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683, the Court said:

> "When a surety has shown that the contract to which he became a surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other

party to show that the surety has consented to the new contract."

In the case of Barrett-Hicks Co. v. Glas, 99 Pac. (Cal.) 856, the Court said:

> "It is well-settled law that a surety may stand upon the strict letter of his bond, and that where a principal has, without the consent of the surety, materially violated the terms of an agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has guaranteed the faithful performance of building contracts."

In the late case of Dunne Inv. Co. v. Surety Co. *et al.,* 150 Pac. 411, the Supreme Court of California said:

> "A surety is exonerated in like manner with a guarantor, for section 2840 of the Civil Code so expressly provides, and a guarantor is exonerated, except in so far as he may be indemnified by the principal, 'if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditors against the principal, in respect thereto, in any way impaired or suspended.' Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or suspended, it is thoroughly settled by our de-

> cisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby."

The statute of California, with reference to the liability of sureties, is the same as the statute of Montana on the subject, and the statute of Montana was undoubtedly taken from California.

It is, however, wholly immaterial whether the obligation of the surety is measured by the statutory law of Montana or by the general law. This Court applied the rule of strict construction to the contract of a surety in the case of the *American Bonding Co. v. U. S.*, 169 Fed. 910.

In the case of Reese v. United States, 9 Wall. 13, the Court, in discussing the liability of sureties, said:

> "Any change in the contract, on which they are sureties, made by the principal parties, to wit, without their assent discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

See, also:

Cross v. Allen, 141 U. S. 537;

Zeigler v. Callahan, 131 Fed. 205;

U. S. v. American Bonding Co., 89 Fed. 925;
Orleans & J. Ry. Co. v. Construction Co., 37 So. 10;
National Surety Co. v. Long, 125 Fed. 887.

II.

It is contended for defendant in error that the trial Court having sustained an objection to an offer of proof that the surety was indemnified by the bridge company, the presumption obtains that it was so indemnified, and consequently it cannot defend as a surety, but must be regarded as a principal.

In the first place, there is no allegation in the complaint that the surety company was indemnified, and, in the second place, the action is squarely based on the contract of the surety company evidenced by the bond made a part of the complaint. But, however this may be, the offer of proof was rejected, and the defendant in error is not in a position to take any advantage of rejection of the offer.

The authorities cited on page 31 of the brief of defendant in error apply a principle of the common law which has been embodied in section 5694 of the Revised Codes of Montana, reading as follows:

> "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction."

Even in such case, the taking of security by the surety for his indemnification, in case of loss, would

not prevent his discharge, if it has been surrendered, or the security has become worthless.

Rittenhouse v. Kemp, 37 Ind. 258;
Fay v. Tower (Wis.), 16 N. W. 558.

There is no pretense that any security by way of indemnity was given in this case. The action is upon the surety company's bond, and it "cannot be held beyond the express terms of its contract."

Revised Codes, sec. 5682.

III.

It is claimed for the county that the change in the location of the center pier and the placing of the floor of the bridge three feet lower than the elevation designated on the plans were authorized by the provisions of the contract, reading as follows:

> "Should the county, at any time, order alterations, deviations, additions or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price as the case may, by a fair and reasonable valuation."

As we have shown in the briefs heretofore filed, the changes in the location of the center pier and in the elevation of the floor of the bridge were not authorized by the provision of the contract just quoted. The fact that such changes were not authorized by the contract, or within the contemplation of the parties, is conclusively established by a reference to the

provisions of the Act of Congress relating to the construction of bridges over navigable streams.

Section 1 of said Act, approved March 23, 1906, provides as follows:

> "That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Section 5 of said Act provides as follows:

> "That any persons who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in ac-

cordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any person who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction therefor shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the Circuit Court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary of War;

and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the Circuit Court of the United States in any district which any portion of said obstruction or bridge touches."

(34 St. at L. 84.)

The location of the center pier and the elevation of the floor of the bridge were matters of vital importance, as they necessarily had to do with the navigability of the stream. The location of the center pier and the elevation of the floor of the bridge were designated on the plans which the contract between the bridge company and the county required should be approved in the manner provided by the Act of Congress before the contract should take effect. As there was no authority to deviate from the plans without first submitting the modified plans to and receiving the approval of the Chief of Engineers and of the Secretary of War, it follows, of course, that the contract did not authorize the County to do what could not have been lawfully done.

IV.

By an Act of Congress, approved March 4, 1912, (37 St. at L. 71), it was provided:

"That the consent of Congress is hereby granted to the board of county commissioners of Lincoln County, Montana, to construct, maintain and operate three bridges, and approaches thereto across the Kootenai River at points suitable to the interest of navigation, located as

follows, all in Lincoln County, Montana: Near the town of Rexford, near the town of Libby, near the town of Troy. Provided, that the aforesaid bridges shall be constructed, maintained and operated in accordance with the provisions of the act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

Congress has, in the exercise of its right to regulate commerce, assumed jurisdiction over the Kootenai River and the presumption obtains that the Act of Congress is constitutional. In the case of United States v. Harris, 106 U. S. 629, Mr. Justice Woods, in delivering the opinion of the court, said:

> "Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no Act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated."

In the case of United States v. Gettysburg Electric R. Co., 160 U. S. 668, the Court said:

> "In examining an Act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such Act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed

by this Court from the foundation of the government."

There is no presumption that the Act of Congress was complied with.

In the case of Texarkana & Ft. S. Ry. Co. v. Parsons, 74 Fed. 408, which was an action to recover damages caused by the erection of a bridge over a navigable river, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Circuit Judge Caldwell, said:

> "Congress has the power to determine the location, plan, and mode of construction of such bridges; and a bridge constructed over a navigable river in accordance with the requirements of the Act of Congress is a lawful structure, however much it may interfere with the public right of navigation." (Citing many cases.)

The Court further said:

> "It is equally well settled by the authorities we have cited that those who seek to justify the erection or maintenance of a bridge across a navigable river, which obstructs its navigation, upon the ground that Congress authorized its erection and maintenance, must show that it was constructed and is maintained in accordance with the requirements of the Act of Congress. The defendant does not seem to have offered any evidence to prove a compliance with any of the numerous requirements of the Act of Congress under authority of which it is claimed the bridge had not been constructed in accordance with the

explicit requirements of the Act of Congress, in a material respect. The Act requires that the openings on each side of the pivot pier shall not be less than 130 feet in the clear, unless otherwise expressly directed by the Secretary of War; and it was not claimed that any such direction was given, and it was conceded that they were only 125 feet in the clear. The fifth section of the Act declares that until the 'plan and location of the bridge are approved by the Secretary of War, the bridge shall not be built.' There was not only no suggestion that the Secretary of War had approved the narrowing of the openings on each side of the pivot pier, but it does not appear that he approved the location of the bridge, or the plans, or any plans whatever, relating to its construction. Indeed, for anything contained in the record before us, this bridge was constructed in entire violation of the law. However this may be, the bridge varies in its construction, in a material respect, from the requirements of the Act of Congress, and is therefore an unauthorized and unlawful structure. The variation is material and substantial and robs the structure of the protection of the statute. The Act of Congress is mandatory, that 'the bridge shall not be built' until certain things have been done. The complaint avers that these things were not done, and there is no evidence in the record tending to show that they were done, and in the absence of proof there is no presumption that they were done. Upon the state of the record, therefore,

the Court would have been justified in telling the jury that the bridge was an illegal structure, and that the defendant was liable to the plaintiff for any damages resulting therefrom."

See, also:

Pennsylvania Ry. Co. v. Baltimore etc. Co., 37 Fed. 129.

In the opinion in the last case cited, Judge Wallace, said:

"The demurrer thus raises the question of the burden of proof in a case where the navigation of public waters has been obstructed under circumstances that constitute a nuisance, unless those concerned are authorized by competent authority to maintain the obstruction in the manner and to the extent in which it exists. I have no hesitation in deciding that those who obstruct the use of a public highway, whether on land or water, must justify the act by producing their authority, and proving that they have exercised it in essential conformity to its terms."

Whatever may be the fact with reference to the approval by the Secretary of War and Chief of Engineers of the plans and specifications originally adopted for the construction of the bridge, proof was made, which is not contradicted, that the center pier of the bridge was constructed a distance of sixteen feet in a direction across the stream from where it was located on the plans, and the floor of the bridge was lowered a distance of two feet and nine inches from the elevation as shown on the plans. These

modifications were made by verbal agreement and without changing the original plan or making any supplemental plan covering the modification. (Record, pp. 105–108.) It follows, of course, that the modifications thus made could not have been approved as required by the Act of Congress. The Act of Congress expressly declares that: "It shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

We therefore submit that the bridge as constructed was a public nuisance, and that the construction of the bridge was in violation of law. Under the circumstances there could be no recovery against the bridge company, for the violation of the contract as an illegal contract cannot be made the basis of a cause of action.

Hart v. City Theaters Co., 109 N. E. 497;
Bradfeldt v. Cooke, 50 Am. St. Rep. 701;
Spurgeon v. McElwain, 27 Am. Dec. 266;
2 Elliott on Contracts, sec. 3704, p. 887;
2 Eliott on Contracts, sec. 664, p. 22;
Miller v. Ammon, 145 U. S. 421.

This Court will, of its own motion take notice of the illegality of the contract, although the validity of the contract is not challenged by the pleadings, and it is the duty of the Court to refuse to grant relief for the alleged violation of the contract.

Oscanyan v. W. R. Arams Co., 103 U. S. 261;
Hall v. Coppell, 7 Wall. 542;
Cansler v. Penland, 48 L. R. A. 441;
Heffron v. Daly, 95 N. W. 714;
Claflin v. U. S. etc. Co., 52 Am. St. Rep. 528;
15 Am. & Eng. Ency of Law, p. 1014.

In the opinion in the first case cited the Court said:

"Here the action is upon a contract which, according to the view of the Judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the Court itself was bound to raise in the interest of the due administration of justice. The Court will not listen to claims founded upon services rendered in violation of common decency, public morality or the law. History furnishes instances of robbery, arson and other crimes committed for hire. If, after receiving a pardon, the culprit should sue the instigator of the crime for the promised reward if we may suppose that audacity could go so far, the Court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading nor, indeed, could it be by the defendant's waiver if we may

suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality."

V.

It is argued for the defendant in error that the change in the location of the center pier to a point nearer the middle of the stream than the place designated for its construction on the plans was not made by direction of the county, but that the responsibility for such change rests on the bridge company.

It is contended for defendant in error that Commissioner Geary was without authority to order the change made, as the County Commissioners can only act authoritatively when assembled as a board. The claim that the responsibility for the change rests with the bridge company, for the reason that Mr. Geary was without authority to make any modification of the contract, completely overlooks the fact that the bridge as constructed was accepted by the county and the full contract price therefor paid. The acceptance of the bridge, and the payment of the contract price, amounted to a ratification of the action of Commissioner Geary in ordering a change in the location of the center pier. There is no pretense but that the change in the location of the center pier was obvious to anyone or that the acceptance of the bridge was made by the county without knowledge of the change.

It is, however, wholly immaterial whether the responsibility for the change in the location of the center pier and the change in the elevation of the floor of the bridge to three feet lower than called for by the plans was with the county or the bridge company, or both; for in either event the county accepted and paid for a bridge which was not constructed according to the contract to which the obligation of the surety company applied. When the county accepted the bridge which differed so materially from the bridge which the bridge company contracted to construct, the acceptance was equivalent to the making of a new contract, the performance of which was not guaranteed by the surety company.

VI.

It is also argued for the defendant in error that the county had no control over the amount of concrete which should be used in the piers, nor over the matter of using piles. In answer to this argument we direct attention to the following provision of the contract:

> "The bridge company promises and agrees to furnish and construct in place any additional concrete required in the said piers below water for fifteen dollars per cubic yard, and any additional concrete required in said piers above water for ten dollars per cubic yard. It is further agreed and understood that, should the county deduct any concrete from said piers, which is hereby made optional with said county, the bridge company will allow the county the

sum of thirteen dollars per cubic yard for all concrete so deducted below water and the sum of eight dollars per cubic yard for all concrete deducted above water. It is further agreed and understood that, should piling be required under any of the piers, the price to be paid for said piling shall be forty cents per lineal foot, and the length of such piling shall be specified and determined by the county or its representative."

This provision of the contract, when considered in connection with the provision of the specifications that "After excavation is made to the full depth, piles shall be driven inside if so ordered by the engineer," shows conclusively that the engineer referred to was an engineer who should be provided by and represent the county.

It is argued for defendant in error that the county was without authority to employ an inspector or engineer to supervise the work, and therefore it cannot be charged with any dereliction of duty in failing to take any precaution to see that the contract was complied with.

Mr. Pratt, one of the commissioners, testified that "The board of county commissioners did not have any engineer, or other person supervising the construction of the bridge in question." (Record, p. 95.)

By the provisions of sections 1387 and 1389 of the Revised Codes, the board was required to cause an inspection to be made of highways and bridges, and "the work done thereon before payment therefor,"

and file "written report of such inspection." Section 5 of the Act of March 11, 1909 (Session Laws of 1909, p. 225), an Act for the permanent improvement of main highways, which includes the construction of bridges (section 13, p. 230, Laws 1909), the county surveyor is given "general charge and supervision of the work, and shall report to the board of county commissioners of this (his) county from time to time the progress of the work and such facts in relation thereto as may be required."

The construction contract and the specifications expressly providing for inspection and supervision of the work by the board of county commissioners, or their authorized representative; the law in force making it the duty of the board to see to it that such inspection was made; the contract also providing that the material and work should be acceptable to the board, or its representative, and that payment should not be made until the completion of the piers and the acceptance of the bridge, the surety had the right to assume that these conditions would be complied with, and the failure on the part of the board of county commissioners to comply with them, either in whole or in part, and accepting the bridge without having taken any precautions to insure the performance of the contract according to its terms and conditions, released the surety company from its obligation.

In City Street Improvement Co. v. Marysville (Cal.), 101 Pac. 308, 23 L. R. A. (N. S.) 317, the Court said:

"In Ashland Lime, Salt & Cement Co. v. Shores, 105 Wis. 122, 81 N. W. 136, where the contract provided that a building should be constructed according to certain plans and specifications, to the satisfaction of the architect, 'who shall inspect all material and work as the building is constructed,' and who was invested with power to reject any material or work not deemed by him to be in compliance with the contract, it was held that the manifest intent was that unsatisfactory material or construction should be promptly rejected; that the architect should not, by silence, allow unsatisfactory construction to proceed to a point where the removal from the building would be attended with serious loss to the builder, and that a failure to reject seasonably operated as a waiver. * * * "

In Ashland Lime, Salt & Cement Co. v. Shores, *supra,* this rule was declared to state a reasonable and just doctrine in cases of this nature. The Court, through Marshall, J., said that where the owner stipulated for inspection and approval as the building is constructed, and for a representative of his own to compel compliance with the contract at every step, if such representative failed to perform his duty, the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory till too late to remedy defects therein without serious loss; that the owner should look

to his architects; that he should be and is bound the same as if he were upon the ground himself, charged with the duty of accepting or rejecting material or construction as soon as there is a reasonable opportunity for the inspection of it. It was said that this is but an application of the elementary principle that, where property is delivered by one person to another, as fulfilling an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with the contract within a reasonable time after a fair opportunity to inspect it, an acceptance will be inferred; and that any considerable delay in that regard must operate, by all equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection."

In Pauly Jail Bldg. & Mfg. Co. v. Hemphill County, 62 Fed. 698, the Circuit Court of Appeals of the Fifth Circuit said:

"In the case as presented for our judgment, the plaintiff was a nonresident corporation, acting entirely through its agents and subcontractors, and the provision in the contract which placed it within the power of the defendant county to select its own commissioner to act as inspector during the building, if honestly carried out in accordance with its terms, would necessarily have been of the greatest assistance and protection to both of the contracting parties,

and would appear to be a wise and prudent precaution in the completion of such a work, the actual supervision of which must necessarily be delegated to the representatives of each party, and could not be scrutinized by the principals of either. By it every opportunity in reason was given for the defendant to secure good materials and work, and the plaintiff would at the same time be protected from the faults and negligence of its own servants, by being immediately informed of, and enabled to correct them, and also from any complaints that might be subsequently made, too late to determine their truth or falsity. The action of such an arbiter or supervisor in the absence of any complaint made at the time and in the manner provided by the contract is *prima facie* evidence of compliance with the contract, and should be conclusive, except upon clear and distinct proof of fraud. Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035; Kihlberg v. U. S., 97 U. S. 398; Sweeney v. U. S., 109 U. S. 618, 3 Sup. Ct. 344; Railroad Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290; Ogden v. U. S., 60 Fed. 725; Railway Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343."

To the same effect:

Moore v. Kerr (Cal.), 4 Pac. 542;

Smith v. Farmers' Trust Co. (Iowa), 66 N. W. 84;

State v. Coleman (Wash.), 127 Pac. 568, p. 571;

Wait on Eng. & Arch. Jr., sec. 467, p. 404;
Wyckoff v. Meyers, 44 N. Y. 143;
District of Columbia v. Gallagher, 124 U. S. 505;
Chicago etc. Ry. Co. v. Price, 138 U. S. 185;
Guild v. Andrews (C. C. A.), 137 Fed. 369;
Continental etc. Bank v. Corey Bros. Const. Co. (C. C. A., 9th Ct.), 208 Fed., on p. 976.

If the county had been represented by a competent engineer, as the contract contemplated, the bridge would not have collapsed. The engineer, if competent, would have directed the placing of the base of the pier at the proper depth in the bed of the stream. The provisions of the contract, contemplating the supervision and inspection of the work by the engineer of the county, were of much consequence to the surety. It is self-evident that the probability of a contractor who has engaged to construct a bridge or other structure, failing to comply with his contract, is much less where the other party to the contract has the right to supervise, direct and inspect than where the contractor is in no manner watched or directed. We therefore submit that, while the bridge company could waive the provision of the contract requiring supervision and inspection by an engineer representing the county, such waiver, without the consent of the surety, exonerated the surety from all liability for any breach of the contract.

VII.

It is further argued for defendant in error that the change in the contract with reference to the time

of payment was authorized by the following provision contained in the contract:

> "Third: Should the County, at any time, order alterations, deviations, additions, or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation."

The language of this provision clearly shows that it did not authorize the change in the terms of the contract with reference to the payment of the contract price. In the case of Blackburn et al. v. Morel et al., 79 S. E. 492, it was contended that a similar provision in a contract considered in that case authorized a change in the terms of payment without the consent of the surety. The Court in the opinion said:

> "The sureties not having consented to this change of the contract, were entitled to claim a discharge, regardless of how it affected them, and even if the change had inured to their benefit.
>
> The fact that the contract provided for change and alteration in the plans of the building has no bearing on the proposition to which we have referred, for there is a marked difference between a change as to the method and amount of the payments and a stipulation providing for changes in the structure to be erected."

VIII.

It is further argued for defendant in error that the change made in the contract cannot be taken advantage of because of the failure of the surety company to allege that the change had been made.

In order to establish a liability against the surety it was necessary for the plaintiff to allege and prove that the bridge was constructed under and pursuant to the contract for a violation of which the surety is sought to be charged. It was also necessary for the plaintiff to allege and prove compliance with the contract on its part, which necessarily involved the making of the payments according to the terms of the contract, for the performance of which the surety was bound. When, therefore, it appeared that the contract had been changed and that the payments were not made according to the original contract, the plaintiff's case failed.

People's Lumber Co. v. Gillard, 68 Pac. (Cal.) 576.

In the case just cited the Court in the opinion said:

> "It is claimed that the suit cannot be maintained, because it is brought on a bond given to secure the performance of the original contract, and the evidence shows that the contract was altered after the bond was executed. The action is brought on the bond attached to the original contract, and the complaint alleges that the bond was given to secure the performance of this contract, and there is no allegation that it was ever altered in any particular. The bond refers to this contract, and no other."

The Court further said:

"The only question is whether plaintiff can recover on the complaint as it stands, if it be made to appear that the contract was materially changed after the bond was given. The cases cited by appellant are to the effect that, having declared on the original contract, it would have been nonsuited on proving that the work was done under a modification or different contract. There was some evidence that the contract was changed as to the dimensions of certain timbers. Plaintiff submitted evidence tending to show that the plans were substantially carried out, and the changes mentioned were in the interest of the contractors, and hence in the interest of defendants. But defendants pleaded other material changes, and offered to prove such changes. If in fact the contract was modified as defendants claimed, it would show that the complaint relies upon a different contract from that which was in fact followed in doing the work, and hence the action in its present form could not be maintained. There would have to be an amendment to the complaint to conform to the facts. It was so held in the cases cited on what seems to be abundant authority. The defendants had the right to show that the original contract referred to in the complaint was not the contract under which the work was done, and it is no answer to the rule of pleading that, even if the complaint had alleged the modification, the defendant would still have been liable under the

provisions of the contract above quoted. See O'Connor v. Dingley, 26 Cal. 11. In the present case there is no difficulty in stating the facts constituting the cause of action. Plaintiff could have alleged the execution of the contract, its terms, and subsequent modification or deviation in accordance with the permission given in the contract, the performance of the contract so far as it was performed, abandonment by the contractors, the subsequent completion of the building by the school district, the breach of the bond, and the damages thereby sustained. As was said in the case last cited: 'If there is any meaning in the rule that the evidence offered must correspond with the allegations, there can be no question that, according to the rules of the practice act requiring the facts to be stated, the contract should be set forth in the complaint, together with the necessary allegations of deviation, performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant was indebted for work and labor, etc.' The case in 61 Cal., *supra,* is in point, and was a suit on a bond, as is the present case, and the principle laid down above was there applied. In that case the bond was given to secure the faithful performance of one Lonsdale with plaintiff. It appeared at the trial that some changes had been made in the contract after the bond was given. The action was on the bond, and it was alleged that the breach arose because of Lonsdale's failure to keep the original contract.

> The Court said: 'It necessarily follows that plaintiff cannot recover damages for nonperformance by Lonsdale of the conditions of the original agreement, upon which, and the nonperformance by Lonsdale of the conditions of which, plaintiff alone counts in his complaint. Even if it should be admitted that the change in the contract between plaintiff and Lonsdale was one contemplated by the wording of the bond, plaintiff could not recover upon allegations of the terms of the original contract, and of nonperformance of its conditions by Lonsdale. His complaint should have set forth the substituted or modified agreement.' ''

See, also, U. S. v. Freel, 186 U. S. 309.

IX.

In answer to the contention in behalf of plaintiff in error that the complaint does not charge that the surety company guaranteed the performance of the contract as modified in February, 1912, it is said that the provision with reference to the driving of piles is the same in the original contract of December 18, 1911, as in the modified contract of February 5, 1912, in consequence of which it is immaterial that the complaint does not show that the obligation of the surety company applied to the contract as modified. Even though the two contracts in the particular mentioned are the same, the contracts differ materially in other respects as shown in our original brief, and the surety company cannot be held liable for the failure of the bridge company to perform a contract to which the obligation of the surety never applied.

It is further argued that the objection that the surety company never guaranteed the performance of the modified contract is made too late, for the reason that the complaint will be regarded as amended to conform to the proof. The difficulty with this argument is that there is no proof whatever that the surety company ever heard of the modification of the contract in February.

X.

It is further argued for defendant in error that it is now too late to present the objection that the plans and specifications for the bridge were never approved by the Secretary of War and the permission of the Secretary to construct the bridge obtained, which were made conditions precedent to the contract taking effect. By the amendment of the complaint made at the trial (Record, p. 61), the original contract dated the 18th of December, 1911, was made a part of the complaint as Exhibit "A." After this amendment an objection was made in behalf of plaintiff in error to the introduction of any evidence upon the ground that the complaint as amended does not state a cause of action. This objection clearly presented the question whether it was necessary to allege that the plans and specifications had been approved by the Secretary of War and permission to construct the bridge obtained. But, however this may be, the contract of December 18, 1911, was introduced in evidence and no proof was made of compliance with the condition requiring the approval of the plans and specifications by the Secretary of War.

It is elementary law that the objection that the complaint in a case does not state a cause of action may be presented for the first time in the appellate court.

Respectfully submitted,

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